Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD R. DAVIS,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Illinois Appellate Court Second Judicial District

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PETITION FOR A WRIT OF CERTIORARI

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December 27, 1994

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITIONER'S CONVICTIONS FOR ACTS AGAINST C.L. CAN STAND WHERE THOSE CONVICTIONS ARE BASED WHOLLY ON THE COMPLAINANT'S PRIOR INCONSISTENT STATEMENTS WHICH HE REPUDIATED AT TRIAL, AND THEREFORE FAILED TO ESTABLISH PASTOR DAVIS' GUILT BEYOND A REASONABLE DOUBT IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENT.

II. WHETHER THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE ADMISSION OF IMPROPER PROPENSITY EVIDENCE WHICH WAS IRRELEVANT AND PREJUDICIAL AND SHOULD NOT HAVE BEEN ADMITTED OR CONSIDERED BY THE TRIAL COURT.

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STATE STATUTORY PROVISIONS:

725 ILCS 5/115-10.1 (1992) 3

Admissibility of Prior Inconsistent Statements:

In all criminal cases, evidence of a statement made by a witness is not inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement —

(1) was made under oath at trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein.

CASES:

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PEOPLE OF THE STATE OF ILLINOIS,

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PETITION FOR WRIT OF CERTIORARI TO THE STATE OF ILLINOIS APPELLATE DIVISION, SECOND DISTRICT

Petitioner, Lloyd R. Davis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the Second District of Illinois, entered in this proceeding on March 25, 1994. The Illinois Supreme Court denied leave to appeal on October 6, 1994.

OPINION BELOW

The opinion of the Appellate Court of the Second District of Illinois appears in Appendix A. The order denying Mr. Davis' petition for leave to appeal to the Illinois Supreme Court entered on October 6, 1994 is Appendix B.

JURISDICTION

The judgment of the Appellate Court of the State of Illinois, Second District, affirming Pastor Davis' conviction in part and reversing in part was entered on March 25, 1994. The order of the Illinois Supreme Court denying leave to appeal was entered on October 6, 1994. This petition for writ of certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . . .

U.S. Constitution, Amendment XIV:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This is a case about homophobia. It is a case about power and the abuse of power. But more, it is the prosecution and incarceration of an innocent minister whose ministry angered local politicians and threatened business as usual. The admission of the so-called other crimes evidence of 31 years cannot be understood without also discussing the rampant homophobia that permeated the trial and sentencing.

Pastor L.R. Davis is the head of the Christian Fellowship Church, a world-wide ministry headquartered in Waukegan, Illinois with churches in Waukegan; Norfolk, Virginia; Fort Lauderdale, Florida; San Diego, California; and Sri Lanka; and fellowship groups in approximately a dozen other states. He was charged in a 27-count indictment filed September 4, 1991, with committing various homosexual acts against two named complainants, A.C. and C.L., both under 17 at the time of the complained-of acts, and with child pornography. (C. 1-74) Shortly before trial and at the trial itself, C.L. recanted his accusations against Pastor Davis. However, the trial court allowed C.L.'s prior written and videotaped statements to authorities, in which he alleged that the defendant had committed acts of anal and oral sex with him, to be admitted as substantive evidence under 725 ILCS 5/115-10.1 (1992).

C.L. testified at trial that he, A.C., and another individual named Jesse Escobar had decided to bring false accusations of sexual misconduct against the petitioner. Prior to making these accusations, they had heard rumors of homosexual activity in the Christian Fellowship Church. Two other Mexican-Americans, Augustine and Cecelie Fregosa, owned a building in Mexico that was rented to the church.

The Fregosas wanted to oust the church and break the lease. They advised the three boys that they could make a lot of money by claiming the defendant had sexually molested them. (R. 1459-1475) C.L. testified at trial that he had seen A.C. in January of 1992 and told A.C. he was dropping everything, but that A.C. responded, "Not me. I got a special lawyer and will get a million dollars." (R. 1542)

A.C., the other complainant, testified that he first met Reverend Davis and two other church members in Tijuana, Mexico in the summer of 1987, when A.C. was 13 and working as a salesperson in a shop along Revolucion Avenue. (R. 269-274) In a sworn statement given by A.C. in his civil suit against the pastor and the church, A.C. testified that he first met Pastor Davis after he was already a member of the church and living in San Diego. He remembered this first meeting because the "whole church was making a big deal" about the pastor's impending visit. (Deposition, March 18, 1993, p. 42) A few days or a week after this meeting, A.C. decided to be baptized into the church. (R. 274) Sometime later that summer of 1987, A.C. moved into a home owned by the church in San Diego and began attending school in California. (R. 279-282)

A.C. stated that during the several months he lived in San Diego, Davis visited the San Diego church two or three times. During these visits, A.C. said, Davis would talk to A.C. about masturbation. A.C. stated that Davis talked about masturbation, "the first day he saw me. I mean not exactly the first day but I mean the first time, you know, like around the first time he visited down there . . . ". A.C. claimed that Davis would call A.C. to his office and ask, "Do you masturbate?" and things like that, and A.C. would say "no." Then

Davis would ask, "What would you do if I caught you masturbating in the bathroom?", and A.C. would respond, "Nothing." The defendant would then say, "I'll throw you a towel," or something. (R. 284-287) A.C. stated that after a period of time, while Davis was asking him about masturbation, the defendant would hold A.C.'s leg or grab his knee, or put his hand on A.C.'s crotch over his clothes and say, "Do you mind?" (R. 289) A.C. said he thought Davis was just "testing" him. (R. 290-292)

A.C. testified that around July of 1988 he flew up to Chicago with Davis and stayed at the church office on O'Plaine Road in Waukegan for the next few months. (R. 295-300) He stated that while he and Davis were in the church office, the defendant would talk to him about sex and kept asking about masturbating. Shortly before a planned church conference in 1988, the defendant was scheduled to travel to Norfolk, Virginia, and asked A.C. if he wanted to go with him. A.C. said yes. According to A.C., Davis asked, "Are you going to put up with me?", and the witness said, "Yeah, why not?" Davis then said, "Well, I don't think I will be able to behave. Do you really want to go?", and A.C. reiterated his desire to go. (R. 308-309) A.C. stated at that point Davis asked him if he, A.C., wanted to masturbate with Davis, and then pulled A.C.'s pants down and put his hand and mouth on A.C.'s penis. A.C. stated that after he, A.C., ejaculated, Davis took paper towels out of a drawer in his desk and gave them to A.C. to clean himself, and then said, "God forgive me." (R. 311-315)

A.C. claimed that the second incident of sexual conduct between him and the defendant took place a day or two later in the same office and that basically the same thing happened, except that Davis took off his own clothes and had

A.C. hold him. A.C. stated that, about the first time after it happened, Davis told him that what happened was not wrong because it kept you from having sex with other women, and that it was just like "getting off." (R. 320-322) On the third occasion, A.C. claimed, Davis brought another church member, Chuck Thompson, into the room and, in Thompson's presence, while Davis was only in his underwear and A.C. was in his pants but no shirt, Davis kept grabbing for A.C.'s crotch and butt. A.C. stated to the prosecutor, "In case you were wondering . . ., I was on my back and turned around, in case you are wondering then he grabbed both places at the same time." (R. 330-332) A.C. stated that he got up and left the room because he was embarrassed when Davis started grabbing for him in front of Thompson. (R. 332)

A.C. testified that the first act of anal intercourse occurred shortly before he and Davis went to Norfolk. He said that the defendant laid out pillows on the floor in the office and after engaging in oral sex with A.C., put vaseline on A.C.'s penis and on his own anus, and instructed A.C. to perform anal sex on him. During the act, A.C. testified, the petitioner told A.C. that it was hurting, so A.C. stopped and Davis then directed A.C. to kneel on a chair and performed anal sex on A.C. Afterwards, the petitioner again said, "God forgive me," and both individuals cleaned themselves up with paper towels, the petitioner also putting some kind of stuff from a bottle on his penis after wiping himself with a paper towel. (R. 333-343)

A.C. stated that the acts he described happened many times over the course of the summer. (R. 343-344) He also stated that, every time something would happen, both he and Davis would ejaculate. (R.372) In a sworn deposition, A.C. stated that Davis was an "old man" who could not achieve or

maintain a full erection. According to A.C., on some occasions, other church members were present and engaged in group sex activities where Davis would tell the others what to do. (R.343-357) A.C. stated that the largest number of people he ever saw in one room at any one time was when approximately seven people were in Davis' office on O'Plaine Road, when it "looked like this big naked party." (R.375-377) A.C. stated that during his trip to Norfolk, he stayed in a hotel room with David and, while there, he, Davis, and Daniel Lantis, the pastor of the San Diego church, engaged in anal sex. (R.383-388)

A.C. claimed that, when Davis was going to engage in sexual activity, he would say, "I am going to stick it in you." (R.386) He stated that Davis also made comments about homosexuality, saying that homosexuality was a sin to death but that what was happening between him and the others was not homosexuality but was just like getting off. (R.389)

A.C. identified some physical characteristics of Davis, stating that the defendant wears a toupee and has false teeth, wears huggers as underwear, is uncircumcised, and has brown and white pubic hair. A.C. said that Davis also had some kind of purple rash by his inner thigh area near his crotch, and white spots on his legs. (R.391-395) He stated that Davis would not take his toupee off during sex, but would take it off and also remove his false teeth before he went to sleep. (R.390-395)

A.C. returned to San Diego in September of 1988. (R.397) In the summer of 1989, while in San Diego, A.C. wrote a letter stating that there was no homosexual activity going on in the church. (R.411) He stated that Pastor Lantis told him what to write in the letter. (R.420-424) A.C. also

participated in the making of an audiotape on June 23, 1989. On the tape, several members of the church identified themselves and stated that no homosexual activities were taking place in the church. During his portion of the tape, A.C. stated that he had been in the church for two years and had been hearing stuff people were saying against Pastor Davis after another pastor (Scott Morehouse) left the San Diego church. A.C. then stated:

> I want to say that all the stuff being said is not true. I know it for a fact, because last summer of '88, I was up in Chicago and I was spending every day with Pastor Davis. He was like taking care of me. Everywhere he went, I went with him, and I know everything he did, because I was with him, everywhere he went. I never saw any such thing as homosexuality in this church, and there is not any such thing as that.

A.C. acknowledged that he had filed a civil suit in California against Pastor Davis and the Christian Fellowship Church, in which his lawyer was asking for over two million dollars. (R.426-428, 453) He said it was his uncle's idea to find a lawyer to file the suit, because his uncle told A.C. he himself had been abused when he was young. (R.426-428)

In July of 1989, shortly after the audiotape was made and the letter was written, A.C. asked to return to Chicago and went there for one week. (R. 366, 1979-1984) Before he left, he and Daniel Lantis spoke with A.C.'s parents about A.C. returning, because his parents had read articles in the newspaper about allegations of homosexuality in the church and did not want A.C. to go. A.C. told his parents the allegations were all lies and they agreed to let him return.

(R.1979-1981) A.C. stated that no sexual acts took place during the one-week period he was in Illinois in July, 1989. (R.366)

Approximately one month after returning from his trip to Chicago, A.C. made allegations of sexual misconduct to Wayne Chumbley, an agent with the Department of Immigration and Naturalization. (R.457) He denied that he spoke to Cecilia Fregosa at the end of July, 1989 about making accusations against Davis, but acknowledged that prior to speaking to Chumbley, he had read a number of newspaper articles discussing allegations of homosexual activity in the church. (R.539-600)

When A.C. was questioned on cross-examination as to whether he was friends with Patti Neill and her husband, San Diego residents who were exmembers of the Church, he stated: "Well, I wouldn't say they are good friends because I don't really talk to them that much but, yeah. If I see them, I'll say hi." (R.549) He acknowledged that his television interview regarding his allegations against Pastor Davis which had aired on ABC's Prime Time Live had been taped at the Neill home, but said that Patti Neill had not urged him to make charges against the petitioner. (R.550-552) A.C. stated in a sworn deposition that he had gone to the Neill's home "because we were all working together, you know." He also stated that Patti Neill had provided him with newspaper articles regarding the church. (March 18, 1993 deposition, pp. 80-83)

Over the continuing objections of the defense, the trial court allowed the State to introduce at trial the testimony of eight other witnesses regarding consensual homosexual acts they allegedly engaged in with the petitioner, and sometimes

other members of the church, while all of them were adults. (R.652-1340) None of these witnesses ever testified to ever having seen the petitioner engage in homosexual acts with A.C. or any other minor, and some specifically stated that they had never seen such activity. (R.705-707, 1317) Each witness' description of the petitioner's leg and groin area varied somewhat, some witnesses stating they observed a rash near the petitioner's groin (R.1036, 1169), and others stating they had never noticed any such rash or mark. None of these witnesses testified to seeing white spots on the petitioner's legs. (See, e.g., R. 1100) The petitioner's pubic hair was described as grayish (R. 692, 1338), or grayish-black (R.1167) Two witnesses agreed that, a lot of times, Davis would sit around in his underwear, talking to people or watching TV. (R.900, 1266)

Several witnesses testified that Davis spoke to them about masturbation and homosexuality, and told them that masturbation was normal and that acts between men were not homosexuality if there was no lust between the men. (R.659, 684, 839, 1152, 1238, 1295) The witnesses testified to various statements the defendant would use prior to or when initiating sexual acts, such as, "Do you want to engage?"; "Is it okay if I get you?" (R.680); "I am going to tear into that tail tonight." (R.912); "Can't you want to have sex?" (R.1027); "I want to stick you." (R.1151); "What if I get you in the butt?"; or "What if I grab you?" (R.1292) The only other evidence regarding the statement "God forgive me," came from defense witness Jesse Escobar who, prior to recanting his allegation that the petitioner had sexually molested him, had told authorities that after engaging in sexual acts with the petitioner, he, and not the petitioner, would say, "God forgive me." (R.1799) Escobar also stated that Augustine

Fregosa had made appointments for him A.C. and C.L. to meet with Agent Chumbley. In December of 1991, both C.L. and Escobar went to see an attorney in Mexico, Pablo Morales, who had represented Daniel Lantis on accusations of sexual misconduct made against him which had ultimately been dismissed by a Mexican court. C.L. and Escobar told Morales that their allegations regarding the petitioner were a lie and subsequently made a video-taped statement acknowledging the falsity of these accusations. (R.1893-1898)

The court also allowed the State to introduce at trial the testimony of Bill Decker. Decker stated that during the late sixties, when he was fourteen year old, he and his family lived in Pacohontas, Arkansas, and attended the United Pentecostal Church where the petitioner was the pastor. He and his family became close friends with the petitioner and his family, and Decker and his brother sometimes stayed at the Davis home overnight.

The witness testified that on December 24, 1969, he had attended a Christmas Eve mass at a Catholic Church with Pastor Davis, and it was decided that he should spend the night at the Davis home because the weather was bad. He and Davis stayed in an empty bedroom which contained two twin beds. Decker alleged that, while the two of them were in this room together, Davis asked Decker to massage his back and chest and that, while Decker did so, Davis put his had on Decker's inner thigh and cupped his genitals, over his clothes. (R.1393-1399)

In response to the prosecutor's question as to whether the petitioner had ever had a conversation with him about homosexuality, Decker stated that on one occasion when he

and Davis were driving through the country, Davis asked Decker if he had ever had a homosexual experience. Decker said no, and Davis switched to another topic. (R.1405)

At the close of the State's case, the trial court granted the petitioner's motion for a judgment of acquittal on Counts X, XIV, and XVIII, all alleging child pornography. (C.550)

At the close of all the evidence, the trial judge stated that he had allowed in testimony regarding the other homosexual acts to show a common plan, scheme or design of the petitioner; his identity; and the lack of a conspiracy against him. He acknowledged that there were "great dissimilarities" in the testimony of the witnesses but stated that there were also "common threads." The common threads he identified were: the petitioner's alleged conversations regarding masturbation and regarding sexual activities between men not being wrong if there was no lust between them; testimony that the petitioner kept pillows or cushions in a closet which some witnesses stated the petitioner had used to lie on during sexual acts; testimony that a chair was sometimes used to kneel on while sexual acts took place; the alleged threats of death or damnation if someone told or left the church; testimony that the petitioner kept lotion and paper towels in his desk drawer which were used before and after the sexual acts; and the age of Billy Decker. (R.2140-2141) Notwithstanding C.L.'s recantation of his allegations against the petitioner, the trial court found that C.L.'s video-taped statement was credible and that C.L. was a liar. (R.2141-2144) the court found the petitioner guilty of "each and every count" of the indictment. (R.2146)

A sentencing hearing was held August 14, 1992. A presentence report reflected that Pastor Davis was born August 8, 1935, and had no prior criminal record. (C.569-572) Hundreds of letters in support of Pastor Davis were submitted to the court, from members of his church, members of the community, and ministers from other churches, and several witnesses also testified on his behalf. (R.2287-2354) The State presented in aggravation evidence regarding homosexual acts allegedly occurring between the petitioner and several other adults who had not testified at trial. (R.2188-2240)

Preliminary to imposing sentence, the court stated: "The burning question that's been presented from the beginning in this case is, is this man a minister or a monster? A pastor or a pedophile?" The phrase, "Minister or monster?" had been used by ABC in its trailers advertising its upcoming Prime Time Live segment on the petitioner. The judge then sentenced Davis to a number of consecutive terms totaling 31 years, as follows: 12 years on Count I of the indictment (alleging and act of oral sex between the petitioner and A.C.); 12 years on Count II (alleging an act of anal sex between the petitioner and A.C.); to be served consecutively to Count I; and 7 years on Count XXI (alleging an act of anal sex between the petitioner and C.L.), to be served consecutively with the sentences on Counts I and II. He imposed 7 year sentences on all remaining Class 1 charges (which included the remaining child pornography counts), to run concurrently with the last consecutive sentence, and 5 year sentences on all remaining Class 2 charges, also to run concurrently with the last consecutive sentence. (R.2412-2419)

On appeal to the Appellate Court for the Second Judicial District, that Court reversed all the petitioner's convictions

on the child pornography counts, finding the child pornography statute to be inapplicable to the acts alleged in the indictment. The Court affirmed all the other convictions and the petitioner's sentence. A petition for rehearing was filed which was denied on April 28, 1994. The Illinois Supreme Court denied the petitioner's Petition for Leave to Appeal on October 6, 1994.

STATEMENT OF PRESENTATION OF THE ISSUE

Petitioner, Lloyd R. Davis, argued in the State of Illinois Appellate Court, Second District, that he was not proven guilty beyond a reasonable doubt for acts against C.L. Also, the petitioner argued that he was denied due process and a fair trial by the admission of improper propensity evidence which should not have been admitted or considered by the trial court. These issues were raised in a post trial motion and were denied. The Appellate Court affirmed the trial court. These issues were similarly raised in the petition for leave to appeal to the Illinois Supreme Court. The Illinois Supreme Court denied the Petition for Leave to Appeal.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED IN ORDER TO DECIDE IMPORTANT QUESTIONS OF CONSTITUTIONAL MAGNITUDE WHICH SHOULD BE SETTLED BY THIS COURT.

A. The State failed to establish Pastor Davis' guilt beyond a reasonable doubt in violation of the Due Process clauses of the Fifth and Fourteenth Amendments.

The trial court found Pastor Davis guilty of committing acts of anal and oral sex with C.L., and the Appellate Court

affirmed these convictions, despite the fact that prior to and at trial C.L. repudiated his pre-trial statements, none of which were made under oath, accusing the defendant of these acts. Other than C.L.'s prior statements alleging that these acts occurred, there was no evidence to support the defendant's convictions on these charges: the State presented no physical evidence corroborating the witness's repudiated statement; there were no admissions of misconduct by Pastor Davis; and there were no other witnesses who testified to observing or participating in the alleged sexual acts between C.L. and Pastor Davis.

The Due Process Clauses of the Fifth and Fourteenth Amendments dictates that the state must meet the burden of "proof beyond a reasonable doubt" standard. *In Re Winship,* 90 S.Ct. 1068 (1970); *Jackson* v. *Virginia,* 443 U.S. 307 (1979)(applying standard to all criminal proceedings). In state criminal trials, the Due Process clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every act necessary to constitute the crime with which he is charged. *Cage* v. *Louisiana,* 498 U.S. 39 (1990).

A person cannot incur the loss of liberty for an offense without notice and meaningful opportunity to defend. "A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused." *Jackson,* 443 U.S. at 313. The conviction of the petitioner rests upon nothing more than repudiated statements of a non-credible witness; this total lack of evidence violates the dictates of the United States Constitution.

B. Pastor Davis' Due Process rights and right to a fair trial were violated by the admission of improper propensity evidence which was irrelevant and prejudicial and should not have been admitted or considered by the trial court.

The State presented as witnesses in its case-in-chief eight men who testified to having engaged as adults in consensual homosexual acts with Pastor Davis. (R. 652-1340) The State also presented the testimony of an individual by the name of Bill Decker, who testified that, nearly 23 years prior to trial, when he was 14, Pastor Davis had on one occasion made improper advances toward him. (R. 1393-1399) Throughout the course of the trial, the defense objected to the admission of this testimony, on the basis that it was irrelevant testimony of misconduct by the petitioner which was only being used to show his propensity to commit homosexual acts. (See, e.g., R. 733-740 & R. 1421-1432) At the close of the trial, in discussing his decision to allow this testimony, the trial judge acknowledged that there were "great dissimilarities" in the testimony of various witnesses, but found that there were "common threads" which made it admissible to show a common plan, scheme or design of the defendant; his identity; and the lack of a conspiracy against him. (R. 2138-2141) On appeal, the Appellate Court affirmed the trial judge's decision to admit this evidence, finding that it was admissible to show a common plan, scheme or design of the petitioner. (Slip op. at page 23) Since this testimony was relevant only to establish the petitioner's propensity to engage in homosexual activity, the trial judge's admission of it completely destroyed any possibility that the issue of the petitioner's guilt or innocence would be fairly decided without the proper consideration of this inflammatory, prejudicial, and irrelevant testimony.

Throughout trial, the prosecution and court made reference to admitting this testimony in order to show a common design or *modus operandi* of Pastor Davis; the Appellate Court found it admissible in order to show common design. Testimony by eight witnesses regarding their consensual homosexual activity with the defendant could not be admissible under the common design exception, since the testimony of these witnesses related to consensual sexual activity between adults, activity which is not a crime. Moreover, showing that the defendant performed homosexual acts with these individuals does not establish a motive with respect to A.C. Finally, the testimony of Bill Decker regarding an act which occurred more than 20 years ago can hardly be considered as part of a common design or scheme in light not only of the remoteness of the prior act but its dissimilarity to the acts alleged by A.C.

The testimony of sexual acts between the petitioner and other consenting adults was also inadmissible under a *modus operandi* theory. Evidence of other acts is admissible under a *modus operandi* theory only upon a showing of a strong and persuasive similarity between the crime charged and the other acts which establishes a substantial and meaningful link between the two. *People* v. *Tate*, 87 Ill.2d 134, 429 N.E.2d 470 (1981). The same distinctive features, not common to most offenses of the type at issue, must be present to establish this link. *Id.* Here, the acts testified to by the other witnesses — the use of cushions and chairs to facilitate the sexual acts; the use of a lubricant to facilitate anal sex; the cleaning up afterwards with paper towels — are acts generic

to homosexual activity. Moreover, a significant distinguishing feature between the acts described by the other witnesses and the acts testified to by A.C. is that all the others were adults when these acts occurred.

In the context of this case, the finding that evidence of other alleged homosexual activity of the petitioner was admissible to show common design or *modus operandi* was no less than a finding that the petitioner's propensity to engage in homosexual acts was admissible to show that he engaged in the acts alleged with A.C. and C.L. The State's Attorney himself, in what was perhaps an unintentional, but telling, remark acknowledged the use to which this evidence was put when during his closing argument he commented that the evidence of the other acts was admissible to show a common scheme and "other known propensity-related reasons . . .". (R. 2085)

With the testimony of the other witnesses stricken from the record, a serious question arises as to whether Pastor Davis' conviction for the acts alleged against A.C. can be sustained. Pastor Davis is entitled to have his guilt or innocence determined without the use of improper and inflammatory evidence of homosexual activity between him and consenting adults, and without the use of evidence regarding a 23 year-old act which bore no similarity to the acts alleged in the case at bar.

These convictions cannot be squared with the Fifth and Fourteenth Amendment of the United States Constitution; thus, certiorari should be granted. *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). This Court has granted certiorari to review matters of evidence in cases where the decision below seems to it to be shockingly wrong and thus to present

substantial Due Process questions. See, *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960); *Garner* v. *Louisiana,* 368 U.S. 157 (1961); *Washington* v. *United States,* 357 U.S. 348 (1958)(federal conviction was reversed without elaboration because of the insufficiency of the evidence). Pastor Davis' convictions are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. The result reached below is unduly harsh in its impact and should be reviewed in light of the apparent harshness of the result — a sentence of 31 years, which amounts to a life sentence for Pastor Davis. *Montana* v. *Kennedy,* 366 U.S. 308 (1958).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the State of Illinois Appellate Court, Second Judicial District.

Respectfully submitted,

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APPENDIX A
No. 2-92-1070

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,* v. LLOYD R. DAVIS, *Defendant-Appellant.*	Appeal from the Circuit Court of Lake County. No. 91-CF-1861 Honorable Christopher C. Starck, Judge, Presiding.

JUSTICE COLWELL delivered the opinion of the court:

After a bench trial, defendant, Lloyd R. Davis, was convicted of 5 counts of criminal sexual assault (Ill. Rev. Stat. 1991, ch. 38, par. 12-13(a)(4) (now 720 ILCS 5/12-13(a)(4) (West 1992))), 10 counts of aggravated criminal sexual abuse (Ill. Rev. Stat. 1991, ch. 38, 12-16(d), (f) (now 720 ILCS 5/12-16(d), (f) (West 1992))), and 9 counts of child pornography (Ill. Rev. Stat. 1991, ch. 38, pars. 11-20.1(a)(3), (a)(4), (a)(5) (now 720 ILCS 5/11-20.1(a)(3), (a)(4), (a)(5) (West 1992))). The trial court sentenced defendant to consecutive sentences totaling 31 years in the Department of Corrections. Defendant appeals, alleging (1) that the State failed to prove him guilty beyond a reasonable doubt, (2) that the trial court erred in allowing "other acts" testimony, (3) that the trial court erred in finding that defendant produced a live

performance of child pornography involving a minor, and (4) that the trial court abused its discretion in sentencing defendant. We affirm in part and reverse in part.

Defendant is the head pastor or "bishop" of the Christian Fellowship Church (Church) which is based in Waukegan, Illinois, and has several branches worldwide, including San Diego, California; Norfolk, Virginia; and Tijuana, Mexico. A Lake County indictment alleged that defendant participated in various forms of sexual activity with two minors, A.C. and C.L., while both minors were members of the Church. Defendant waived a jury trial and his bench trial commenced on June 22, 1992.

A.C. testified at trial that he was born June 24, 1974, in Los Angeles, California. In July 1987, A.C. was selling goods on Revolucion Avenue in Tijuana, Mexico, when he was approached by defendant, Scott Morehouse, Chuck Thompson, David Armstrong, and other members of the Church. Defendant and the others talked to A.C. about their church and took him to lunch. A.C. made plans with defendant's group to be baptized at the San Diego branch of the Church. A.C. then returned to work.

A.C. became friends with another boy named C.L. who also worked on Revolucion Avenue. C.L. had already been baptized in the Church. A.C. and C.L. eventually crossed the border to visit the Church in San Diego where A.C. was then baptized. A.C. moved up to San Diego during the summer of 1987 to live in a house owned by the Church. A.C. lived in the Church house and attended school until the spring of 1988.

Defendant visited the Church in San Diego a few times during this period. A.C. testified that defendant would call A.C. into his office and ask him if he masturbated. Defendant

told A.C. that masturbation was not a sin because it kept one from having sex with women and fornication was a bad sin. Defendant would often hold A.C.'s leg close to the knee. A.C. said that defendant grabbed A.C.'s crotch while they were at a hotel in San Diego. A.C. said he thought defendant was testing him.

Defendant asked A.C. if he wanted to visit the "mother Church" in Chicago. A.C. said he wanted to go because he thought he was doing a "good thing for God" and he felt privileged that defendant had asked him. A.C. came to Waukegan in the summer of 1988. A.C. stayed at the Church office on O'Plaine Road in Waukegan. Defendant continued to talk to A.C. about sexual matters. Defendant asked A.C. if he would like to visit the Church in Norfolk, Virginia. A.C. said yes because he thought it would be a privilege. Defendant then asked A.C. if he wanted to masturbate with him. When A.C. did not respond, defendant pulled A.C. over to a couch, pulled A.C.'s pants down, and stroked A.C.'s penis. Defendant then performed fellatio on A.C. After A.C. ejaculated, defendant gave him a paper towel from his desk and said "God forgive me." Defendant then took A.C. to a store and bought him a watch.

A day or two later defendant called A.C. to his office again. Defendant took his clothes off and produced a large pillow from the closet which he put on the floor. Defendant and A.C. then sat on the pillow. Defendant had A.C. hold defendant's penis and defendant performed fellatio on A.C. again. On the third occasion, defendant brought another

minister, Chuck Thompson, up to the office with A.C. Defendant was lying on the large pillow on the floor in his underwear. He repeatedly grabbed for A.C.'s buttocks and crotch in front of Chuck Thompson but A.C. became upset and left the room.

On another occasion A.C. was in the office with defendant lying on the ground. Defendant again performed fellatio on A.C. and then got Vaseline lotion and paper towels out from his desk drawer. Defendant put Vaseline on his anus and gave A.C. some to rub on his penis. Defendant instructed A.C. to perform anal sex on defendant but A.C. was unable to finish because defendant said it hurt him. Defendant told A.C. to put his knees on a chair facing the back of the chair. Defendant then applied more Vaseline onto A.C.'s anus and performed anal sex on A.C.

Defendant's sexual acts with A.C. continued during the summer. A.C. also had sex with other members of the Church many times. Defendant was always present when this occurred. A.C. said it was defendant's idea that A.C. have sex with Michael Carner, another Church member. Defendant told Carner to perform oral sex on A.C. while defendant watched and masturbated. Carner also performed fellatio on defendant. On another occasion defendant instructed David Armstrong, another Church member, to perform fellatio on A.C. while A.C. did the same to Armstrong. Defendant then performed oral sex on A.C.

A.C. testified that defendant performed sexual acts with him at the "mother Church" on Belvidere Road in Waukegan

during the summer of 1988. One incident involved A.C., defendant, and another man whose name A.C. could not recall. The three men each performed oral sex on one another in the Church office.

A.C. said that there were many incidents when several men were present for sexual acts with A.C. and defendant. A.C. recalled one occasion when seven or eight men were in the office on O'Plaine Road. Defendant controlled the situation and would direct the people as to what he wanted them to do sexually. A.C. described the scene as a "big naked party."

A.C. traveled to Norfolk with defendant during the summer of 1988. A.C. testified that several sexual episodes occurred during this trip. On one occasion, defendant directed A.C. to apply Vaseline and perform anal sex on Daniel Lantis, the pastor at the Church in San Diego. Defendant watched and masturbated during this time.

Defendant told A.C. that homosexuality was a sin, but the acts they were performing were no different than masturbation and were not sinful if there was no lust between the men. A.C. testified that defendant wore a wig and has false teeth. He said defendant wore white brief type underwear. A.C. recalled that defendant was uncircumcised and had white and brown pubic hair. He also noted that defendant had a purplish rash around his inner thigh and white spots on his legs. Defendant never wore a condom. Defendant would say, "I'm going to get ya" when he referred to anal sex.

A.C. returned to San Diego in September 1988. Defendant would occasionally visit and perform sexual acts with A.C. at the Royal Vista Hotel in San Diego. One incident

involved defendant and Armstrong. Other incidents occurred at the Church-owned home on Oceanview Boulevard in San Diego. On one occasion A.C. attempted to have anal sex with defendant. A.C. admitted he also had oral sex with Vernon Engler, another Church member, when defendant was not present.

A.C. thought about leaving the Church sometime in 1989. When A.C. told defendant of his intentions, defendant said "God, I pray you take this sole [*sic*] or man off the earth." Some members of the Church told A.C. to write a letter stating that there was no homosexual activity going on in the Church. A.C. refused at first but after speaking with defendant he finally acquiesced. A.C. signed the letter, stating therein that he had not been forced to write the letter. A.C. also made an audio tape stating he did not witness any homosexual activity among the Church members.

A.C. returned to his house in Mexico and told several people about the sexual incidents with defendant. C.L. informed A.C. that similar acts had happened to him. C.L. told A.C. that he was going to talk with Wayne Chumbley, an agent with the Immigration and Naturalization Service (INS) in San Diego. A.C. decided to go too. A.C. said he revealed to Chumbley all the sexual incidents that were going on in the church. A.C. also gave statements to Wayne Maxey of the San Diego district attorney's office and to personnel at the San Diego Children's Hospital.

A.C. denied that Cecilia Fergosa, a friend of A.C. and a former member of the Church, told him and C.L. that they could gain money if they accused defendant of sexual acts.

A.C. testified that it was his uncle's idea to file a civil law suit in California based on the sexual acts defendant performed with A.C.

At trial, A.C. was shown a paper with his signature stating that he would not testify against the Church. A.C. said he wrote this because C.L. was threatening him and trying to get A.C. to stop accusing the church. C.L. had recanted his allegations against the Church and maintained that everything he said previously was untrue. C.L. also offered A.C. money to make a videotape in which they would both recant their previous testimony against the Church and declare that they had made the accusations for money. A.C. indicated he suffered from bleeding in his anal area but he did not know if it was in any way related to the sexual acts with defendant.

Scott Morehouse testified that he joined the Navy and was stationed at Great Lakes Naval Base (Great Lakes) in Waukegan during January 1979. He soon became a regular visitor at the Church's Serviceman's Center near Great Lakes which was where he came to know defendant. Morehouse talked with defendant about opening a branch of the Church in Norfolk where Morehouse was to be transferred with the Navy.

Defendant visited Morehouse in Norfolk several times while Morehouse was still involved in the Navy. Defendant began making references that he wanted to have sexual encounters with Morehouse. Defendant often talked about masturbation and said it was a natural act. Defendant and Morehouse later engaged in sexual acts in a hotel room in Norfolk. During defendant's next visit six months later, he and Morehouse engaged in sexual acts on several occasions.

These instances involved anal sex between defendant and Morehouse. On one occasion, three other men were present and participated in sexual activity. Defendant would direct the men as to the sexual acts they were to perform on each other. Defendant used Vaseline petroleum jelly and paper towels to clean up afterwards.

After Morehouse was discharged from the Navy, he became completely involved with the Church. During a visit to the Church in Waukegan, Morehouse engaged in sexual acts with defendant in his Church office. Defendant would inquire if Morehouse "wanted to engage" or would ask "[i]s it okay if I get ya?" Defendant would typically use a large cushion placed on the floor for sexual acts. Defendant reassured Morehouse that homosexual acts were not wrong as long as it was just a "physical release" and you did not love the man as a wife.

From 1983 to 1989, Morehouse served as pastor at the Church in San Diego. He also had oral sex with defendant at the Church office in San Diego on Saipan Avenue. Morehouse testified that defendant had a hairpiece and wore dentures. Defendant wore white brief underwear, was uncircumcised, and had gray pubic hair. Morehouse also noticed a scar below the beltline on defendant's back.

Morehouse testified that defendant directed him to recruit young Latino men along Revolucion Boulevard in Tijuana. Defendant said he wanted to train men to carry the word of God back to Mexico. Defendant told Morehouse to work with the boys and try to get them to come up to services in San Diego. Morehouse specifically recalled approaching A.C. Defendant wanted Morehouse to recruit A.C. to get him up to San Diego. Morehouse said defendant showed A.C.

much attention and always kept A.C. near him during prayer meetings. Morehouse never observed sexual activity between defendant and A.C. either in San Diego or Waukegan.

Morehouse decided to leave the Church in 1989. He felt that the sexual activity with defendant was wrong and he also suspected that defendant had had sexual relations with C.L. After Morehouse left the church, he wrote a letter saying he respected defendant and appreciated him as his pastor. Morehouse admitted that he told United Press International, at defendant's direction, that no homosexual activity took place in the Church. Morehouse said he spoke with Chumbley regarding A.C. and C.L. Morehouse said he had an idea that defendant was abusing the boys because of prior conversations with A.C. and C.L. in 1989.

Joseph Byron testified that he was in the Navy in Norfolk when he met defendant in December 1980. Bryon was discharged from the Navy in 1982 and moved to Waukegan because he hoped to advance in the Church. In July 1983, Bryon was at the Karcher Hotel in Waukegan when defendant approached him, grabbed his buttocks, and asked "[w]hen are you going to let me get you right there?" Several days later defendant summoned Bryon to his office. When Bryon entered the office he found defendant lying on the floor nude. Defendant removed lotion and paper towels from his desk and told Bryon it was acceptable to relieve tension in this manner. Upon defendant's instruction, Bryon performed anal intercourse on defendant. Defendant then asked Bryon to lean on a chair while defendant tried unsuccessfully to perform anal intercourse on Bryon.

Bryon had sexual relations with defendant on one occasion when Dick Brand, another Church member was present.

Bryon said defendant wore white briefs and had a hairpiece. Bryon left the Church in 1986, indicating he had lost faith in the Church. Defendant told him to leave the Church which, according to the Church doctrine, meant Bryon was going to hell.

Randall Sorenson testified that he met defendant through his brother, Rick Sorenson, who joined the church in 1975. Randall testified that in 1978 he moved into the Karcher Hotel in Waukegan with other Church members. He had previously been stationed at Great Lakes. Randall spent a lot of time at the Church's Servicemen's Center, located across the street from Great Lakes.

Defendant told Randall that sex between two men was not homosexuality if there was not love involved; rather, the act itself was just masturbation. Defendant would often talk about sex and ask Randall "[w]hat if I get ya?" On one occasion, defendant initiated anal sex with Randall while using Vaseline as lubricant. Randall testified that about five such sexual acts occurred between him and defendant. Defendant unsuccessfully attempted to have oral sex with Randall on one occasion.

Randall said defendant wore white briefs and was uncircumcised. He said defendant wore a toupee and had a bridge in his mouth. Randall and Rick Sorenson contacted the Lake County State's Attorney's office regarding defendant's actions but were told that no laws had been broken. Randall gave information to a reporter at the Waukegan News-Sun. In 1991, Rick appeared on the television show "Prime Time" which featured the allegations against defendant.

Gerald Adams testified he entered the Navy at Great Lakes in 1989. He was soon approached by a member of the

Church. He began attending Church services and often visited the Servicemen's Center across from Great Lakes. Shortly thereafter, Adams entered the O'Plaine Road office and saw defendant and Kevin Sherri, a Church member, lying naked on a big pillow and fondling each other. Another Church member named Bob was also present. Defendant told Adams to disrobe and then had Adams and Sherri perform oral sex on one another. Defendant directed Sherri to have anal intercourse with Adams. Defendant placed Adams on a chair and performed anal sex on him. Vaseline Intensive Care Lotion was used as lubricant.

Two weeks later, Adams was summoned to the office and performed sexual acts with defendant and Chuck Thompson. Vaseline and paper towels were produced from defendant's desk drawer. Defendant said these acts were not homosexuality as long as no love or lust was involved. Adams had sex with defendant at least 20 times, often with as many as four people present.

Adams said defendant wore a toupee and had false teeth. Defendant had a purple-colored rash on his groin area and wore white brief type underwear. Adams admitted he wrote two letters denying that anything irregular had happened in the Church. He later told investigator Mark Pleasant of the Department of Children and Family Services (DCFS) that the letters were false. Adams admitted he had sex with other members of the church, including Thompson, Joe Watson, Dave Armstrong, and the Church trumpeter.

Julius Gruber testified that he was in the Navy stationed in San Diego in 1982 when he became involved with the Church. After he was discharged from the Navy, Gruber

became involved with the Church in Waukegan. Gruber performed sexual acts with defendant and Armstrong together on two occasions. Defendant performed anal sex on Gruber on some occasions while Gruber was balanced with his knees on a chair. When defendant wished to have sex, he would tell Gruber "I want to get you" or "I want to stick it to you." Defendant also directed Gruber to have sexual relations with Rich Snow, Richard Brand, Dave Armstrong, Keith Verna, Steve Kirsch, Bill Blackwell, and Mike Carner. Gruber had sex with defendant from 120 to 150 times from 1984 until 1991. Gruber never saw defendant have sex with minors.

Gruber said defendant had grayish-colored pubic hair and wore white briefs. He said defendant wore a toupee and had a purplish rash on his legs and groin area.

Rick Sorenson testified that he was stationed at Great Lakes and first met defendant in 1974. After Rick joined the Church, defendant once kissed him on the lips at the Karcher Hotel and asked "[w]hat would you do if I was to get you in the tail?" In 1978 or 1979, Rick was called to defendant's office and told to rub defendant's back. Defendant then rubbed Vaseline on his penis and performed anal intercourse on Rick. Rick had anal sex with defendant for the next few weeks on a daily basis. Rick described defendant as having gray pubic hair, wearing white briefs, and having brown spots on his legs.

Defendant said Rick would die a violent death if he left the Church. Nonetheless, Rick and Randall Sorenson confronted defendant about the sexual activity and left the Church. Defendant frequently called the Sorensons afterwards to ask whether they had told anyone about the sexual activity.

Howard Ross became involved with the Church in 1979 while stationed at Great Lakes. Defendant had oral and anal sex with Ross at the Karcher Hotel, the Servicemen's Center, and the Church office. Defendant used Vaseline as lubricant and kept hand towels in his desk drawer to clean up. He also testified that defendant was uncircumcised, wore white briefs, and had a toupee. Defendant equated homosexuality with masturbation and often directed Ross to have sex with other male members of the Church. Ross had sex with defendant over 100 times. Defendant would ask Ross "[w]hat if I got you in the butt?" before sexual activity occurred.

Ed O'Claire joined the Navy in 1979 and became involved with the Church in 1980. Defendant once grabbed O'Claire's buttocks and said "[w]hat if I get you right here?" In 1981 at the Karcher Hotel, defendant took Vaseline Intensive Care Lotion from his desk drawer, applied it to O'Claire, and had anal sex with him. O'Claire also had sex with defendant at the Washington Street office, the O'Plaine office, the Belvidere Street Church, and in Virginia. Defendant sometimes placed O'Claire on a chair for anal intercourse. Defendant told O'Claire that such acts were proper so long as no love or lust was involved. O'Claire also had sex with other church members while defendant watched and masturbated.

Bill Decker testified he lived in Pocohontas, Arkansas, in the late 1960's. When he was 14 years old, his family attended a Pentecostal Church where defendant was pastor. Defendant became a friend of the family. On one occasion, Decker stayed at defendant's house overnight. Defendant asked Decker to rub his back. Defendant removed his underwear and then cupped his hand over Decker's genitals.

Decker moved away in alarm. Defendant propositioned Decker again soon after. Defendant moved from the town after Decker's mother reported him to the church leaders.

C.L. testified that he was born on January 14, 1972. He met Morehouse and Thompson in Tijuana in 1987 and soon after joined the Church. C.L. lived in a Church-rented apartment in Chula Vista, California, for five months.

C.L. visited Waukegan in January 1988 and worked at the Church for about a year. C.L. said he returned to Tijuana in January 1989 because his father was sick. He then quit the Church. C.L. admitted giving statements to various investigators in August 1989, November 1989, and January 1991 regarding defendant's sexual activity with him. C.L. admitted he told Mark Pleasant from DCFS that defendant kept lotion and paper towels in this desk but C.L. said this statement had been untrue. C.L. denied participating in any sexual activity with defendant in Waukegan, although he had told Chumbley in his statement from January 1991 that this had occurred. C.L. admitted he previously told investigators at San Diego Children's Hospital that he had anal and oral sex with defendant but said his statements there had been untrue.

C.L. denied that he had sex with defendant during a trip to Norfolk. C.L. admitted he told investigators that defendant had gray pubic hair. C.L. also admitted saying that defendant would tell him "I'm going to get you" or "I'm going to put my dick in your butt." C.L. admitted telling investigators that defendant performed sexual acts with the Church trumpeter, Mike Connors. C.L. testified at trial that all these previous statements were lies. C.L. admitted telling

investigators that defendant took gray pillows from the closet and used them to have sex on the floor but this had also been untrue.

C.L.'s statements to Chumbley, Art Walker, and Mark Pleasant at the San Diego Children's Hospital were offered into evidence to pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963. (Ill. Rev. Stat. 1991, ch. 38, par. 115-10.1 (now 725 ILCS 5/115-10.1 (West 1992))). In his statements, C.L. also said that defendant had offered him papers to make him legal in the United States and that defendant said C.L. would go to hell if he left the Church. C.L. had told investigators that defendant was not circumcised. C.L. said defendant also told him that fornication with women was wrong and that sex with men was allowed as long as one controlled one's thoughts. C.L. said all these statements were not true. C.L. also admitted saying that defendant told him that a person who had accused him of being a "faggot" had been run over by a truck. C.L. admitted the videotape was an accurate account of his statement but what he said had been untrue.

C.L. said that Cecelia Fergosa, a former church member, was the instigator of all the lies about defendant. She told C.L. that he and A.C. could talk about defendant and make some money. Cecelia hated defendant because she owned the Church building in Tijuana and could not get the Church to leave. Cecelia gave C.L. and A.C. a packet of newspaper articles regarding the allegations against defendant.

C.L. said the charges against defendant were motivated by money and he made his statements after reading the articles he received from Cecelia. C.L. said that Cecelia told him to say defendant talked to him about masturbation, that

defendant raped him, and that defendant was a homosexual. C.L. testified first that Cecelia did not tell him to describe the Vaseline in defendant's desk, but then later C.L. testified that he said Cecelia did tell him about how he would describe the Vaseline. C.L. said that Cecelia told him to talk about sex in the chair and sex with other members of the Church. C.L. admitted that some of the statements he allegedly got from the newspaper articles are not contained therein. C.L. said he remembered everything Cecelia told him to say and he relayed this to agent Chumbley. C.L. said he rejoined the Church late in 1991 but he denied receiving financial assistance from the Church.

Arthur Walker testified that he is a chief investigator for the Lake County State's Attorney's office. Walker stated that he and Mark Pleasant, another investigator, traveled to San Diego to interview C.L. on January 22, 1991. Agent Wayne Chumbley from the INS and David Rubin from the San Diego district attorney's office were also present. Walker stated that C.L. understood the questions posed to him and was not coerced into cooperating. Walker stated that C.L. signed and attested to the fact that his statements were true and accurate.

Debra Paine and Pamela Thomas testified that they are defendant's daughters. They both stated that Decker did not spend the night at their house on the evening of the alleged abuse.

David Armstrong, Michael Carner, and Vernon Engler are all Church members who had been charged in connection with these accusations against defendant. All three testified

at trial and denied having sex with A.C. Armstrong and Carner said they rejected the State's offer of a lesser punishment in exchange for their testimony against defendant.

Jesus Cervantes "Jesse" Escobar testified that he is 23 years old and lives in Tijuana. He joined the Church in 1988 and has known C.L. for six years. In July 1989, Escobar was present during a conversation among A.C., C.L., and Cecelia Fergosa. Cecelia urged them all to accuse defendant of rape, saying if they did so they would receive money. Scott Morehouse, who had left the church, made an appointment for Jesse, A.C., and C.L. to meet agent Chumbley at the border. Before the meeting, Jesse said he, A.C., and C.L. planned to "fuck him (defendant) up." A.C. spoke of making a million dollars.

Jesse admitted giving tape-recorded statement to Chumbley on August 28, 1989, in which he said defendant had touched his buttocks. Jesse said defendant told him that engaging in masturbation and homosexual activity was not wrong but being with a woman was wrong. Defendant kissed Jesse's penis and then performed anal sex on Jesse. Jesse testified at trial that these statements had been lies.

Charles Thompson testified that he has been a member of the Church since 1982. Thompson never saw defendant grab A.C.'s crotch or touch A.C. in a sexual manner. Thompson said he has never had sex with A.C.

Daniel Lantis testified he is the pastor of the Church in San Diego. He said that neither he nor anyone else told A.C. to write the letter stating there was no homosexuality in the Church. Lantis said A.C. wanted to go to Chicago in 1989. A.C.'s mother expressed concern over the newspaper articles alleging defendant's homosexual activity. Lantis and A.C.

explained to A.C.'s mother that the allegations in the articles were lies. Lantis said he has never had sexual relations with A.C. and has never seen defendant have sexual relations with A.C.

The trial court found defendant guilty on all remaining counts. Defendant filed a post-trial motion which was denied. The defendant was sentenced to 31 years of imprisonment. Defendant filed a timely appeal.

Defendant first contends that the State failed to prove him guilty beyond a reasonable doubt. Defendant notes that the State's case was primarily based on the testimony of A.C. and the section 115-10.1 statements of C.L. Defendant admits that each of the two witnesses established his ability to lie but that A.C.'s testimony is far less credible.

The reviewing court may not substitute its judgment for that of the trier of fact with respect to the weight of the evidence or the credibility of the witnesses. Rather, a criminal conviction is not to be overturned on review unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *(People* v. *Draheim)* (1993), 242 Ill. App. 3d 80, 88.) The relevant question is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the offense beyond a reasonable doubt. (*People* v. *Collins* (1985), 106 Ill. 2d 237, 261.) Under this standard, the evidence is clearly sufficient to affirm the trial court's judgment.

The trial court properly concluded that A.C.'s testimony was believable and sufficient to support the verdict. A.C. relayed in detail the series of events which led him to join the Church and develop trust and respect for defendant. A.C.

said he respected defendant as the "bishop" of the Church and felt privileged that defendant wanted A.C. to accompany him on out-of-town trips and Church events. A.C. felt grateful that he could do something "good for God."

Defendant subtly initiated his sexual advances by holding A.C.'s leg and asking him if he masturbated. From there, defendant's actions escalated to grabbing A.C.'s crotch and then performing reciprocal acts of oral and anal sex with A.C. A.C. first thought that defendant was testing him. After it became apparent this was not the case, A.C. continued to acquiesce in performing sexual acts because defendant threatened that A.C. would "burn in hell" and "cry forever" if he did not participate. Defendant also told A.C. that the homosexual acts they performed were similar to masturbation and were a good tension release.

Defendant argues that A.C. is discredited by C.L. and Jesse Escobar's testimony that they, along with A.C., conjured up the stories of sexual abuse to make money at the urging of Cecelia Fergosa. C.L. said he got information about the allegations from newspaper articles and he lied about the fact that defendant had performed such acts on him. C.L. also testified that A.C. refused to recant his allegations because he wanted to make "a million dollars." We believe that this testimony is simply not credible given the consistency of A.C.'s testimony throughout these proceedings and in light of the fact that C.L.'s previous statements to investigators contained sexual details about defendant that were not included in the newspaper articles. We also believe that the dissimilarities between C.L.'s and Jesse's statements and A.C.'s statements are not significant and only indicate that no conspiracy to destroy defendant ever existed.

Defendant also contends that a thorough cross-examination of A.C. was not permitted since defense counsel was precluded from asking A.C. if he suffered from any physical manifestations of sexual abuse. A.C. stated that he had bleeding from his anal area but could not attribute it to abuse from defendant. The trial court sustained that State's objection to any further questions regarding A.C.'s physical examination in San Diego following the allegations. However, we note that the State never attempted to relate the anal bleeding with A.C.'s sexual activity with defendant; therefore, the trial court did not err in precluding this question. Further, a lack of injury would not disprove sexual abuse. See *People* v. *Glass* (1992), 239 Ill. App. 3d 916 (testimony of victim of sex offense, as with any crime victim, need not be substantially corroborated by medical evidence in order for defendant to be found guilty beyond a reasonable doubt).

Defendant argues he was also precluded from asking if A.C. ever talked with Chuck Thompson about his involvement with drugs and alcohol. A.C. had previously denied ever talking about his drug and alcohol usage the the Church. We agree with the trial court that defense counsel's attempt to impeach A.C. on that basis was improper since such matters were based on rumor and speculation. (See *People* v. *DeSavieu* (1983), 120 Ill. App. 3d 420, 430 (impeachment of witness on alleged drug addiction improper where no evidence of addiction would be shown).) The trial court did not err in sustaining the State's objection to this question.

Defendant also contends that the State asked leading questions of A.C. in order to enhance his testimony. A.C.'s testimony included over 200 pages of direct examination and was of considerable length. Defendant refers to only two

leading questions posed by the State, regarding defendant's underwear and defendant's repeated use of the terms "[w]hat if I get ya" or similar expressions to convey his desire for sex. However, defendant's objections to these questions were sustained, and we do not conclude that posing either of these questions changed the outcome of the case. We hold that A.C.'s testimony was credible and that the evidence is sufficient to affirm defendant's conviction.

Defendant next contends he was unfairly prejudiced and denied the right to a fair trial where the trial court allowed "other acts" testimony regarding sexual conduct with several adult males. Defendant argues that the prejudicial impact of the testimony of these men outweighed any probative value and amounted to prosecutorial overkill. Defendant concludes that such testimony made it impossible for him to receive a fair trial.

As a general rule, evidence indicating that a defendant committed prior bad acts is improper where its purpose is to demonstrate the defendant's propensity to commit crime. *(People* v. *Davis* (1993), 248 Ill. App. 3d 886, 891.) Such evidence, often referred to as "other offenses" evidence or "extrinsic acts" evidence, is admissable if it is relevant to establish any material question other than to show the propensity to commit crime. *(People* v. *Steward* (1984), 105 Ill. 2d 22, 62; *Davis,* 248 Ill. App. 3d at 891.) The erroneous admission of other offenses evidence carries a high risk of prejudice and generally calls for a reversal. *(People* v. *Mason* (1991), 219 Ill. App. 3d 76, 80.) Therefore, the trial court must balance the probative effect of such evidence against any prejudicial effect. *(Davis,* 248 Ill. App. 3d at 891.) A reviewing court will not disturb the trial court's decision concerning the admission of other offenses evidence absent an abuse of discretion. *People* v. *Vazquez* (1989), 180 Ill. App. 3d 270, 277.

We note that defendant's activity with the adult male witnesses at trial was that of consenting adults and thus was not a crime. However, other-crimes evidence may include acts which may not be a criminal offense. (See *People* v. *Smith* (1990), 141 Ill. 2d 40 (evidence of gang membership is admissible to show motive, but only where there is sufficient proof that such membership is related to the crime charged).) Defense counsel made numerous objections during trial in an attempt to preclude the admission of other acts evidence. The trial court's comments indicate it allowed such testimony to show the common plan, scheme, and design of the defendant, to confirm defendant's identification, and to demonstrate the lack of a conspiracy by the victims as alleged by the defense. While other acts evidence is admissible for

these purposes (see *Mason*, 219 Ill. App. 3d at 80), the trial court must take care to consider the proper limited purpose for such evidence. We note here that the trial judge repeatedly stated during trial that he would only consider those aspects of the witnesses' testimony that were appropriate.

We conclude the evidence of sexual relations with other men was relevant and admissible as part of a common plan, scheme, or design. All of the witnesses testified that defendant initially approached them with questions about masturbation and whether they had ever participated in homosexual acts. The witnesses were told that homosexual acts were similar to masturbation and were not wrong as long as no love or lust for the man was involved. Defendant's questions would typically become more frequent and defendant would say things in the context of these conversations such as "I'm going to get ya" or "[w]hat if I were to get ya?" Many of the witnesses concurred with A.C.'s testimony that defendant would use Vaseline Intensive Care Lotion ar Vaseline petroleum jelly as lubricant. The testimony indicates these items were kept in defendant's desk drawer along with paper towels for cleaning up afterwards.

A.C.'s description of how defendant would position him to have sex in a chair was also similar to accounts given by several of the witnesses. Some of the witnesses' testimony mirrored A.C.'s description of sexual acts performed on the floor with a large pillow which defendant kept in his office. These accounts were similar enough to inform the court of defendant's common plan, scheme, or design, but were varied enough to be credible and to confirm that the testimonies were not part of a rehearsed conspiracy against

defendant. Defendant correctly notes that none of the witnesses testified that they observed defendant exhibiting inappropriate behavior or sexual activity with minors. However, we believe it would only be logical that defendant would chose to reveal his sexual activity with a minor to a select cadre of Church members, some of whom have also been charged in connection with these offenses.

In addition, these witnesses gave detailed accounts of defendant's intimate physical makeup which were similar to those contained in A.C.'s testimony. Specifically, several witnesses testified that defendant wore a toupee or hairpiece, had false teeth or a bridge, was uncircumcised, had grayish pubic hair, never wore a condom, had a rash on his groin, had spots on his legs, and wore white brief underwear. Five of the witnesses testified, as did A.C., that defendant told them they would go to hell if they left the Church. The fact that the testimonies varied slightly indicates the victims and witnesses did not rehearse their statements as part of a conspiracy. We believe the probative value of these statements outweighed any prejudicial effect and that such testimony was relevant and admissible. In addition, this case does not present the same possibility of prejudice inherent in a jury trial since it is presumed that the court considers only admissible evidence in a bench trial. (See *People* v. *Dugan* (1992), 237 Ill. App. 3d 688, 698.) The trial court did not abuse its discretion in allowing such testimony.

Defendant also argues that Decker's testimony should be regarded with grave scrutiny since the alleged act occurred over 20 years ago. However, our supreme court has noted that "the admissibility of other-crimes evidence should not, and indeed cannot, be controlled soley by the number of years that have elapsed between the prior offense

and the crime charged." *(People* v. *Illgen* (1991), 145 Ill. 2d 353, 370.) The decision whether to admit such evidence must be made on a case-by-case basis by the trial judge. *(Illgen,* 145 Ill. 2d at 370.) We conclude Decker's testimony was sufficiently credible and probative to be admissible and was not an abuse of discretion.

Defendant next contends that his convictions of child pornography must be reversed since the record is devoid of any evidence that defendant produced a live performance or solicited A.C. to appear in a live performance where the minor was sexually exploited. Defendant was convicted of nine counts of child pornography which alleged he solicited A.C., a minor, and produced live performances where A.C. was directed to engage in various lewd acts, including oral and anal sex with David Armstrong and Michael Carner. Defendant contends that a live performance or presentation contemplates activity which is produced for the benefit of an audience; therefore, because the activity here was not produced for the benefit of an audience, an essential element of the offense was not present.

Defendant's child pornography convictions were based on section 11-20.1(a) which reads in pertinent part as follows:

> "(a) A person commits the offense of child pornography who:
>
> * * *
>
> (3) with knowledge of the subject matter or theme thereof, produces any stage play, live performance, film, videotape or

other similar visual portrayal which includes a child whom the person knows or reasonably should know to be under the age of 18 * * * engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection; or

(4) solicits any child whom he knows or reasonably should know to be under the age of 18 * * * to appear in any stage play, live presentation, film, videotape, photograph or other similar visual reproduction in which the child * * * is or will be depicted, actually or by simulation, in any act, pose or setting described in subparagraphs (i) through (vii) of paragraph (1) of this subsection; or

(5) is a parent, legal guardian or other person having care or custody of a child whom the person knows or reasonably should know to be under the age of 18 * * * and who knowingly permits or arranges for such child * * * to appear in any stage play, live performance, film, videotape, photograph or other similar visual presentation, portrayal or simulation of any act or activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection * * *." (Ill. Rev. Stat. 1991, ch. 38, pars. 11-20.1(a)(3), (a)(4), (a)(5) (now 720 ILCS 5/11-20.1(a)(3), (a)(4), (a)(5) (West 1992)).)

The acts described in subparagraphs (i) through (vii) of paragraph 1 include oral and anal intercourse, masturbation, and lewd fondling. (Ill. Rev. Stat. 1991, ch. 38, pars. 11-20.1(a)(1)(i) through (vii) (now 720 ILCS 5/11-20.1(a)(1)(i) through (vii) (West 1992)).) A.C. testified that on several occasions he engaged in sexual activity with defendant together with other Church members; one such gathering included as many as seven or eight other men. Defendant would always direct the sexual acts that the men were to perform on one another and then defendant himself would join in the activity. A.C. testified that defendant would typically direct one person to perform oral or anal sex with A.C. while defendant watched and masturbated.

Defendant cites *New York* v. *Ferber* (1982), 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348, in support of his contention that an audience is necessary for defendant's acts to constitute child pornography. In *Ferber,* the Supreme Court upheld as constitutional a child pornography statute that described a performance as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." (*Ferber,* 458 U.S. at 751, 73 L. Ed. 2d at 1119, 102 S. Ct. at 3351.) Defendant contends the element of "production" is not satisfied here since the directions which defendant reportedly gave during sexual activity with A.C. were part of defendant's own participation and did not contemplate the amusement of an audience. The State counters that no case law supports the argument that our statute is limited to require such acts in front of an audience.

We agree with the State that the legislative debates which defendant appended to his brief do not add anything that would support his contention. In addition, the State correctly notes that section 11-20.1(f)(2) of the Criminal

Code of 1961, which defines "[p]roduce" as "to direct, promote, advertise, publish, manufacture, issue, present or show," does not specifically refer to an audience. Ill. Rev. Stat. 1991, ch. 38, par. 11-20(f)(2) (now 720 ILCS 5/11-20.1(f)(2) (West 1992)).

However, we do not believe that our child pornography statute was intended to apply to acts such as those alleged in A.C.'s testimony. The sexual acts which defendant orchestrated were clearly executed for defendant's own pleasure and most likely the pleasure of the other adults present; however, we do not conclude that such acts constituted a live presentation or performance as contemplated in the statute. The acts here occurred in the privacy of defendant's office and all those present were participants to some extent. This setting renders the actions less akin to child pornography. Rather, the adults committing sexual acts with A.C. would be guilty of aggravated criminal sexual assault. (See Ill. Rev. Stat. 1991, ch. 38, par. 12-13 (now 720 ILCS 5/12-13 (West 1992)).) Accordingly, we reverse defendant's convictions on the child pornography counts outright. All remaining convictions stand.

Defendant next contends that the trial court abused its discretion in sentencing defendant when it considered as aggravation a factor inherent in the charged offense. Defendant contends that the trial court applied in aggravation the factor that "defendant held a position of trust or supervision" with regard to A.C. (Ill. Rev. Stat. 1991, ch. 38, par. 1005-5-3.2(a)(14) (now 730 ILCS 5/5-5 3.2(a)(14) (West 1992)).) Defendant argues that this factor was inherent in several counts of the indictment. See Ill. Rev. Stat. 1991, ch.

38, par. 12-13(a)(4) (now 720 ILCS 5/12-13(a)(4) (West 1992)); Ill. Rev. Stat. 1991, ch. 38, par. 12-16(f) (now 720 ILCS 5/12-16(f) (West 1992)).

- This court has previously held that the aggravating factor relating to a defendant who holds a "position of trust or supervision" could be applied to a convicted sex offender who was the minister of a church. (See *People* v. *Bosley* (1990), 197 Ill. App. 3d 215, 222.) Defendant notes that, in *Bosley,* the defendant's status of trust was not an element of the charged offense. However, we do not conclude that the trial court's comments on this issue warrant a reversal. The record indicates that the trial court included the issue of defendant's position of trust generally during his comments prior to sentencing. The trial judge's comment in the context of the entire sentencing hearing does not indicate that this issue led to a longer sentence which would in turn necessitate a remand for resentencing. See *People* v. *Bourke* (1983), 96 Ill. 2d 327, 332.

Defendant also contends the trial court erroneously considered as an aggravating factor that defendant was obliged to prevent the offense committed because of his position as pastor. (See Ill. Rev. Stat. 1991, ch. 38, par. 1005-5-3.2(a)(4) (Now 730 ILCS 5/5-5-3.2(a)(4) (West 1992)).) Here, the trial court made the following comments:

> "I agree with factor number four that the defendant was obliged to prevent this type of situation. In fact ministers I believe are mandatory reporting people * * * . If ministers aren't, they should be. A minister should be the last person to abuse a child, and if he finds out about it, he's supposed to call DCFS or call the police and report it and stop it right now this minute."

Defendant correctly points out that this factor does not apply to clergymen and that the trial court erred in considering it as an aggravating factor. (*Bosley*, 197 Ill. App. 3d at 222.) However, given the overwhelming evidence in this case and the trial court's thorough discussion of all the factors in aggravation and mitigation, we believe the trial court's considerations of this factor was not significant enough to result in a greater sentence. *Bourke*, 96 Ill. 2d at 332.

Defendant also contends that the trial court failed to consider the mitigating testimony of defendant's witnesses and the large volume of supportive letters as mitigating factors. We note that the trial court specifically stated that defendant was eligible for an extended-term sentence. However, the trial court considered "the good things defendant has done, the good things he's done for the community, his lack of prior criminal record, his age, his health problems," in addition to the letters of support, in determining that an extended sentence was not appropriate. We conclude the trial court properly considered the factors offered in mitigation.

Defendant last contends his sentence was excessive, cruel, and unusual. Defendant notes he is 57 years old, has no criminal record previous to these proceedings, and has received only three minor traffic violations. Defendant also suffers from diabetes, high blood pressure, and pain in his joints. The trial court sentenced defendant as follows: count I, 12 years; count II, 12 years consecutive to count I; count XXI, 7 years consecutive to counts I and II; counts XIII, XV, XVI, XVII, IXX, XX, XXII, XXIII, 7 years concurrent with the third consecutive sentence and consecutive to the first two sentences; and counts III, IV, V, VI, VII, VIII, IX, XI, XII, XXIV, XXV, XXVI, XVII, 5 years concurrent with the third consecutive sentence and consecutive to the first two

sentences, for a total of 31 years of imprisonment. The trial court ordered defendant's sentences on the child pornography convictions to be concurrent to sentences on his other convictions; thus, our reversal of the pornography counts does not lessen defendant's total years of imprisonment.

A trial judge's sentencing decision is entitled to great deference and weight. (*People* v. *Perruquet* (1977), 68 Ill. 2d 149, 154.) A reviewing court's power to alter or reduce a sentence pursuant to Supreme Court Rule 615(b)(4) (134 Ill. 2d R. 615(b)(4)) is limited to those cases in which a trial court has abused its discretion. (*People* v. *Keating* (1993), 252 Ill. App. 3d 801, 803.) Defendant contends that the trial court neglected to consider the objective of restoring defendant to useful citizenship and failed to impose a sentence which balances the rehabilitation potential of the offender with the need to protect society. However, the trial court must consider not only the defendant's history and his rehabilitative potential, but also the seriousness of the offense, the need to protect society, and the need for deterrence. *People* v. *Goodwin* (1991), 208 Ill. App. 3d 829, 831.

The trial court is in a better position than this court to fashion an appropriate penalty after observation of defendant and consideration of such factors as defendant's demeanor, general moral character, mentality, social environment, habits, and age. (*Keating*, 252 Ill. App. 3d at 803.) We believe the trial court properly considered the seriousness of the offenses and defendant's repetition of such acts in sentencing defendant to 31 years of imprisonment. The trial court acknowledged defendant's lack of criminal record and possible health risks and clearly lessened the

sentence in consideration of defendant's good acts in the community. We hold the trial court did not abuse its discretion, and we affirm defendant's sentence.

For the foregoing reasons, we reverse defendant's convictions on all child pornography counts and affirm all remaining convictions and sentences.

Affirmed in part; reversed in part.

DOYLE and PECCARELLI, JJ., concur.

United States of America

State of Illinois,
Appellate Court,
Second District, } **ss.**

I, LOREN J. STROTZ, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the decision of the said Appellate Court in the above entitled cause of record in my said office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 25th day of March, A.D. 1994.

/s/ LOREN J. STROTZ

Loren J. Strotz
Clerk Appellate Court
Second District

77249

ILLINOIS SUPREME COURT
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SUPREME COURT BUILDING
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October 6, 1994

Mr. Jed Stone
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No. 77249 — People State of Illinois, respondent, v. Lloyd R. Davis, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1994.